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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. 331

UNION PLANTERS NATIONAL BANK OF MEMPHIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to United States Court of Appeals for the Sixth Circuit

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to United States Court of Appeals for the Sixth Circuit

Union Planters National Bank of Memphis, Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 4, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (unpublished) appears in the appendix hereto. The opinion of the District Court for the Western Division of

the Western District of Tennessee, reported at 295 F. Supp. 1151 (W. D. Tenn. 1969), also appears in the appendix, as does the judgment of the United States Court of Appeals for the Sixth Circuit entered May 4, 1970, and the judgment of the District Court in favor of the petitioner entered November 21, 1968.

JURISDICTION

The final judgment of the Court of Appeals for the Sixth Circuit was entered on May 4, 1970. The petition for certiorari is filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTION PRESENTED

Was petitioner, a National Bank, the owner of municipal bonds purchased from bond dealers obligated to repurchase them without loss to petitioner, so that interest income received thereon by petitioner prior to repurchase by dealers was exempt from income tax under Section 103 of the Internal Revenue Code, as was held by the District Court, or was petitioner simply a lender secured by bonds owned by bond dealers, so that interest income collected by petitioner was taxable income as though it were interest paid petitioner by dealers, as was held by the Court of Appeals?

STATUTORY PROVISIONS INVOLVED

No statutory provision is directly involved, but indirectly involved is that portion of Section 103 of the Internal Revenue Code, 26 U. S. C. 103(a), which provides:

> "General Rule.—Gross income does not include interest on—(1) the obligations of a State, a Territory, or a possession of the United States, or any political

subdivision of any of the foregoing, or of the District of Columbia, * * *"

Also indirectly involved, by reason of the Government's position, is Section 265 (b), Internal Revenue Code, which is as follows:

> Section 265. EXPENSES AND INTEREST RELATING to tax exempt income.
>
> No deduction shall be allowed for
>
> * * * * * * *
>
> (2) INTEREST. Interest on indebtedness incurred or continued to purchase or carry obligations * * * the interest on which is wholly exempt from taxes imposed by this sub-title.

STATEMENT OF THE CASE

The petitioner is a national bank with its principal banking offices in Memphis, Shelby County, Tennessee (15a).

For several decades, petitioner purchased public authority bonds from dealers under repurchase agreements by which petitioner could resell to the dealer at no loss to petitioner. (The written agreement is included in the appendix hereto.) Interest income on such bonds is not included within gross income. 26 U. S. C. 103(a). Petitioner received interest income while it owned such bonds, which the government nevertheless contends should be included within gross income and taxed as such.

Petitioner began purchasing public authority bonds in the late 1930s, when many public authorities had occasion to issue bonds to refinance outstanding bond issues at

* All references are to the printed appendix, filed in the Court of Appeals, which is included in the record filed in this Court.

lower interest rates and finance new projects. These bond issues were offered to the public but, in accordance with general practice, would be acquired first by one or more bond dealers on public bid, and would then be retailed to the bond dealers' various customers. Some banks found it desirable to compete with the bond dealers by purchasing such bond issues for their own accounts and reselling to their own customers. Other banks, such as petitioner, chose instead to work with the dealers rather than to compete with them. Petitioner did so within the states of Alabama, Mississippi, Louisiana, Tennessee and Arkansas, an area in which the issuing authorities and their bond issues were not large. Large eastern financial institutions were not interested in working with such issues on any basis. Petitioner found a field in which it could significantly benefit the economy of the entire area. As a result, petitioner developed the practice here involved (15a, 27a, 143a).

Petitioner concedes that this type of transaction tended to eliminate the dealers' need for loans secured by such bonds. But, the problem required a different solution; namely, purchase and ownership of the bonds by petitioner. The transactions were developed and handled solely on that basis. It is plain from the history of these transactions that at the time they were developed there was no thought of tax avoidance. There were numerous other compelling reasons for petitioner's interest in these transactions and for handling them as they were. One of the prime reasons was to create an available market for the bond issues so that the various governmental projects could be carried forward (27a, 28a, 80a, 83a). Another prime purpose was to afford the petitioner liquid, relatively short-term, investments for otherwise idle funds (88a). These transactions also provided a strong stimulus in the economic development of petitioner's entire trade area, and also was in furtherance

of the congressional policy behind Section 103 of the Internal Revenue Code: "to aid in the flotation of government bond and securities by making them tax free and therefore more attractive to investors." **Holley v. United States**, 124 F. 2d 909 (CA 6, 1942), cert. den. 316 U. S. 685; **American Viscose Corp. v. Comm'r. Internal Revenue**, 46 F. 2d 1037 (CA 3, 1932); cert. den. 287 U. S. 615.

There were still other reasons. Petitioner obtained the good will of many dealers by not competing with them and, instead, enabled them to sell more bonds than they could otherwise have done. Petitioner's role also led, in many instances, to being named trustee, or paying agent, or both. Petitioner earned fees for these services, and obtained increased deposits, consisting of the funds to be used for paying bond interest or principal. These funds were substantial and remained on deposit for long periods of time (86a, 87a).

Finally, it must, of course, be recognized that the coupon interest received by the petitioner while it held the bonds, although low in rate, was tax exempt, so that petitioner received a good rate on its investment, in most instances better than the commercial loan rate would have afforded (37a, 82a).

When this practice originated, the repurchase agreements were all oral. About 1951, at the suggestion of the bank examiners, a written agreement was drafted and generally used thereafter (28a, 79a, 80a, 95a, 96a, 123a). In many instances, however, the use of the written agreement was overlooked, and in some instances it may have been used with a dealer on one occasion but thereafter may have been neglected or overlooked. In any event, the oral understanding was the same, namely, that on demand from the petitioner a bond dealer would repurchase the bonds without loss or profit to the petitioner.

(80a). The oral agreement, of course, was not legally enforceable.

Throughout all of these years the routine followed has been the same. Generally, a dealer would bid on or agree to purchase all or part of an issue at a specific price. If he had sold all of the bonds to his customers by the time they were actually issued, transactions here involved would not come into play. If he had not found sufficient purchasers, he would pay for the bonds and then sell them to the petitioner under the repurchase agreement, usually delivering the bonds to the petitioner with an actual invoice for the agreed sale price and accrued interest. In some instances, he would ask the petitioner to pay the issuing authority and receive the bonds directly, but petitioner would receive from the dealer an invoice, showing a sale of the bonds to the petitioner under the repurchase agreement (15a, 17a, 67a, 84a, 86a).

Petitioner held these bonds until the dealer had found customers who desired them. While the petitioner had no obligation to convey the bonds to the dealers, the understanding was that it would do so. When the dealer wished to repurchase some of the bonds, petitioner sold them to him, with its own invoice to the dealer. In some instances, the dealer would request petitioner to ship the bonds directly to his customer. In such instances, petitioner also invoiced the dealer, showing a sale to the dealer, and the dealer, in turn, invoiced his customer (18a, 19a, 85a, 86a).

Petitioner usually owned the bonds less than six months. During its ownership, petitioner clipped the coupons and surrendered them for its own account. When a dealer repurchased bonds between coupon maturities, he would pay the petitioner accrued interest (88a).

During all the years that these transactions have been used, the petitioner has had two bond accounts on its ledgers. One was its bond reserve account and the other

its bond trading account. In the bond reserve account, petitioner carried only long-term, high-quality bonds purchased for its reserve investment fund. In the trading account, the petitioner carried lower-quality bonds held as short-term investments. These were of three classes: (1) bonds purchased individually for resale to the public; (2) bonds purchased as a member of a syndicate or joint venture, for resale to the public; and (3) bonds purchased from dealers under repurchase agreements (24a, 25a, 78a, 79a).

The record shows that the petitioner received an invoice when it purchased bonds of any character for any purpose, and issued one when it resold them. The record also shows a most material and substantial difference in the handling of the bonds held in the bond reserve account and those held in the trading account. Petitioner treated bonds held for its bond reserve account as loans, but did not so regard bonds held in its trading account. The record shows that petitioner through all these years had a loan or discount committee, which met daily. Every loan made by the petitioner had to be approved by that committee. Throughout the years, all purchases of bonds for the bond reserve account were submitted to the loan committee for approval. Without such approval, they were not purchased. Purchases of bonds for the trading account, however, including bonds purchased with repurchase agreements from the dealers, were never at any time submitted to the loan committee for approval (25a, 27a, 38a, 39a, 140a).

The record here shows that in setting up its ledgers and accounts covering these transactions, petitioner treated them as sales rather than loans. At all times prior to 1957, petitioner's records listed bonds held under repurchase agreements as assets and not as loans. In 1957, however, the Comptroller of Currency rendered an opinion (167a) in which he ruled that such bonds should be shown

as borrowing transactions and must be kept within the limitations provided in Section 5202 of the Revised Statutes (12 U.S.C. 82). Accordingly, the ledger sheets covering these transactions were stamped with the words, "Loans", "Bonds held under Repurchase Agreement", or with the word, "Carried", and the bonds were carried in the loan section of the petitioner's ledger (168a). Even after the 1957 ruling, petitioner identified these bonds as "Securities held under Repurchase Agreement" in its annual stockholders' reports, and did not include them in "loans and discounts" on its balance sheets (20a, 21a).

In March, 1964, the Comptroller reversed himself, and held that these transactions were not loans for any purpose. Thereafter, they were not included in loans on petitioner's books. They were carried as "state and municipal securities", which, of course, included bonds other than those held under repurchase agreements. Of course, even after the 1964 ruling some existing ledger sheets still carried the designation, "Loans, Bonds Held Under Repurchase Agreement", because the ledger sheets were set up with respect to each bond issue, and not with respect to each bond dealer, and remained in use until petitioner no longer owned any of such issue. Whenever petitioner was left free to do so, it never treated these bonds as loans. In fact, such bonds were not even treated as loans in computing petitioner's reserve for bad debts for tax purposes. Such reserve would have been increased by treating these bonds as loans, which would have decreased petitioner's taxes. Nevertheless, this was never done (176a).

It may be observed here that the government placed evidence in the record from one or two bond dealers that their own accountants required them to treat these bonds as assets offset by a loan liability to the petitioner. On the other hand, petitioner showed that other dealers did

not carry the bonds as assets in any manner, but simply footnoted a contingent liability under the repurchase agreements. The question of how the dealers carried them probably is not of any real significance, not only because some did it each way, but because it is clear in the record that the petitioner had nothing to say about how the dealers carried their records or set up their books.

There is evidence that one, and possibly some of the other dealers, in a trade magazine known as THE BLUE BOOK, advertised for sale the bonds which they were obligated to repurchase. The dealer, of course, knew that he could repurchase the bonds on request if he found the customer. The Government and the Court of Appeals seem to attach unusual significance to the fact that the dealers were permitted to advertise these bonds in the Blue Book. Any such significance vanishes completely when we look at the testimony of Mr. Lancaster that the dealers were allowed to advertise any bond carried by petitioner in its trading account, whether covered by a repurchase agreement or not. Mr. Lancaster, in rebuttal testimony, testified specifically that the entire trading account was made available to any number of dealers, who advertised those bonds in their booklets, including the Blue Book. Petitioner's entire trading account was, after all, held for resale to the public. He went on to explain that when a dealer was interested and asked what bonds the bank had available in the trading account, he, Lancaster, would give him full information. If the dealer found someone who wanted them, the bonds could then be moved (207a, 208a).

It is significant that in only three instances were dealers requested to repurchase bonds and failed to do so. In each instance, petitioner either sold the bonds to third parties or retained the bonds as an investment. Profits from the transaction were retained by the petitioner and were not paid to the dealer, as would have been required if the transaction had been a loan. In one case, the dealer

was indebted to petitioner on conventional loan transactions. If the bond purchase transaction had in reality constituted a loan, profit from the sale of the bonds would have been applied to reduce the other indebtedness of the dealer. The reduction was not made (89a, 95a).

Petitioner would not argue here the soundness of the opinion below. However, it will be of some value to discuss some of the fallacies of that opinion in the light of the actual facts involved. The Court below conceded that the form of the transactions was a purchase and resale, and not a loan. (Opinion below, p. A-3) The substance of the transactions also is incompatible with a loan, and reflects true ownership. A national bank cannot lend money without taking a note. None was taken in these transactions. The repurchase agreement was the sole instrument involved, and was not even written in most cases. It contained no obligation by the dealer to pay any affixed sum on a date certain or on demand. The agreement did not even obligate the dealer to repurchase the bonds at a certain figure. And petitioner was under no contractual obligation to return the bonds, as it would have been if the bonds were collateral for a loan.

The remedies available to the parties to the transaction were also inconsistent with a loan transaction. If the dealer refused to perform his repurchase agreement, petitioner could not obtain judgment for the value of the bonds, as if they were simply the amount of a loan. Petitioner could only obtain a judgment for damages resulting from the dealer's breach of his repurchase obligation; [illegible] any increase in market value since petitioner purchased them. On the other hand, if the dealer desired the bonds, he had no right to tender the money and obtain them, as he would have had if the bonds were simply security for a loan. Although petitioner usually did resell to dealers on request, the dealer could not legally

compel petitioner to do so. And, if petitioner sold the bonds to others at a profit, petitioner was entitled to, and did, retain the profit. If the bonds had been security for a loan, such profit would have been legally owed to the dealer. **Commissioner v. The Bank of California**, 80 F. 2d 389 (9th Cir. 1934); **Cowan v. Singer Mfg. Co.** (1893), 92 Tenn. 376, 21 S. W. 663.

The transactions here involved completely lacked the essential characteristics of a secured loan transaction. The court below overlooked these substantive differences. The court also incorrectly characterized the economic effect of the transaction. The opinion stated that, unless treated as a loan, "the dealer will have obtained the funds to purchase the bonds [from petitioner] without paying interest." (Opinion below, p. A-3.) But the dealer never purchased the bonds until he had a customer for them. He didn't "obtain funds" from petitioner when he operated under the repurchase agreement any more than he did when he obtained a customer for a bond held in petitioner's trading account which was not subject to any repurchase agreement; even the Government doesn't contend that interest on such bonds was taxable to petitioner. Nor does the dealer "obtain funds" from the issuing authority between the time the authority commits itself to sell to the dealer and actual issuance of the bonds, even though the dealer proceeds to obtain customers for the bonds on the assumption he can get them when he requests them from the authority. Moreover, the holding below means that any bond sold to a customer which the dealer agrees to repurchase means that the customer has loaned money to the dealer. Such a result is absurd. Finally, I. R. C., § 265 (2), is simply a limitation on **deductions**. This case deals solely with the definition of gross income, which Congress has explicitly narrowed to exclude the type of income received by petitioner while it owned the subject bonds.

While many facts were stipulated by the parties, many were not. The District Court heard evidence offered by both parties in open court, and from conflicting evidence found the following facts in addition to those stipulated.

1. The purchase price paid by petitioner when it purchased bonds from dealers and entered into the repurchase agreements was less than par and was usually the dealer's exact cost (210a).

2. In some instances the dealers, at the suggestion of their accountants, showed the bonds on their statements as their property, but in others they did not show them as their property, but showed a contingent liability by virtue of the repurchase agreement. In neither case did petitioner have anything to say as to how the bonds were carried in the dealer's records (212a-213a).

3. Bonds purchased by the petitioner in connection with repurchase agreements were never submitted to the petitioner's loan or discount committee for approval as were all bonds purchased for the petitioner's reserve account. The latter were considered as loans, while the bonds purchased for the trading account were not (213a).

4. There were only three instances where the dealers refused to repurchase when called upon by the petitioner. In each instance the petitioner sold the bonds for its own account and made a profit which it retained. The plan was developed by the petitioner in order to aid the small local dealers and in order to aid the issuing authorities who were not substantial enough to interest the large eastern banks. There were numerous indirect benefits accruing to the petitioner (213a-215a).

5. Petitioner owned the bonds and interest coupons while it held them, and exercised all elements of control and collection over the interest (214a).

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decisions of other Courts of Appeals as to the application of 26 U. S. C., § 103(a).

Section 103(a) of Title 26 excludes from gross income interest received on local governmental obligations. The Sixth Circuit here held that Section inapplicable to interest received by petitioner on bonds subject to repurchase agreements. This holding directly conflicts with the decisions of the Ninth Circuit in **Commissioner v. The Bank of California**, *supra*, affirming 30 BTA 566, and **Commissioner v. Wells-Fargo Bank**, 80 F. 2d 390 (9th Cir. 1934). These cases were not cited below despite the decisions in favor of the taxpayer rendered on virtually identical facts.

The Ninth Circuit cases involved similar transactions under a similar repurchase agreement (reprinted in the appendix hereto) which obligated the dealer to repurchase without loss to the bank. The agreement went further, however, in giving the dealer an option to purchase. If not repurchased, the bonds could be sold. Any profit was the bank's, but any loss was charged to the dealer. The bank retained all interest accrued during its ownership. The bonds were transferred at specified prices by invoice. The Ninth Circuit affirmed the finding of the Board of Tax Appeals "that the transactions referred to were actual purchases, not loans of money secured by pledge, and that the bonds belonged to and were the property of respondent." (80 F. 2d at 390.) In contrast, the court below found that "these transactions, although characterized as sales-repurchases by the parties, will be regarded as secured loans." (Opinion below, p. A-6). The conflict is apparent.

The Tenth and Fifth Circuits have also [illegible] question. Although the Tenth Circuit [illegible] taxpayer, its construction of [illegible] the Ninth Circuit. In **First National Bank of Wichita v. Commissioner**, 57 F. 2d 7 (10th Cir. 1932), U. S. 636, affirming 19 B. T. A. 744 (1930), [illegible] advanced the face value of securities, [illegible] market value, and its customer assigned [illegible] An agreement permitted the customer to [illegible] If the customer did not do so, the bank [illegible] in the market. Any profit, as well as any [illegible] to the customer. The agreement further required the customer to pay interest at the current loan rate [illegible] unrelated to the coupon rate and usually [illegible] ties considered the coupons to be the [illegible] not the bank's. When due, the bank delivered them to the customer, who cashed them in [illegible] The bank claimed no ownership in the coupons [illegible] attempted to exclude the commercial interest [illegible] by the customer from gross income. The Tenth Circuit affirmed the Board of Tax Appeals' finding that the interest paid by the customer was not excludable [illegible] purpose of the arrangement was to evade [illegible] under the banking laws.

The Board and the Tenth Circuit both held that the decisive question was which party, under the agreement, had the right to receive the coupon interest. The courts found, under the facts presented, that the bank, and not the customer, had the right to receive the tax-free interest. Thus, the **Bank of California** case [illegible] But the principle of decision, and the [illegible] (a), was the same. Both cases hold that the party who possesses the right to receive coupon interest, and that party, is entitled to exclude such interest from income. In its **Bank of California** opinion, the Board at

Tax Appeals explicitly applied the legal principles enunciated in **First National Bank in Wichita**, and held for the taxpayer because it did, in fact, own the interest. The trial court below found the same fact, applied the same law, and held for petitioner. The Sixth Circuit's reversal directly conflicts with both the Ninth and Tenth Circuits.

This question was more recently presented to the Fifth Circuit in **American National Bank of Austin v. U. S.**, 421 F. 2d 442 (5th Cir. 1970), petition for cert. filed, 37 U. S. L. Week 3, 466 (U.S. May 18, 1970) (No. 1587). The District Court followed the Ninth and Tenth Circuits and held for the taxpayer bank, which owned the right to the coupon interest [296 F. Supp. 512 (W. D. Tex. 1968)]. The facts differed from the instant case and **Bank of California** in only two respects: there were no written agreements at all, and the dealers had the option, but no obligation, to repurchase the bonds. In the instant case, the dealers had the obligation, but no option. In **Bank of California**, they had both the option and the obligation. The trial court found that the First National Bank of Austin was the party to the transaction which had the right to receive coupon interest (296 F. Supp. 512, 513). The Fifth Circuit declined to apply the clearly erroneous rule, and reversed on the basis of its own finding that a genuine basis in reality for the bank's ownership of the coupons was "absent here when all the facts and circumstances are carefully examined" (421 F. 2d at 454). It is clearly apparent that the Fifth Circuit decision also directly conflicts with those of the Tenth and Ninth Circuits.

2. **The decision below conflicts with the decisions of other Courts of Appeals concerning the scope of appellate review in tax cases.**

Rule 52(a) of the Federal Rules of Civil Procedure (28 U. S. C.) provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses."

The trial courts in each of the five cases dealing with this issue found **as a fact** that the taxpayer either possessed, or did not possess, the right to receive coupon interest. The Ninth and Tenth Circuits limited their review to a determination of whether or not the finding was reasonably supported in the record. The court below virtually conceded that the evidence conclusively established that petitioner possessed the right to receive coupon interest, when it stated: "There is little dispute here about what obligations and rights the parties expected their agreement to confer." (Opinion below, p. A-4.) In direct conflict with the Ninth and Tenth Circuits, however, the court declined to be bound by the finding, stating that the issue was legal rather than factual. (Opinion below, p. A-4) The Fifth Circuit, in **Bank of Austin**, felt similarly unfettered by its trial court's finding; stating: "obeisance to the clearly erroneous rule must yield when the facts are undisputed and we are called upon to reason and interpret." (421 F. 2d at 451.)

The decision below directly conflicts with those of the Ninth and Tenth Circuits in treating the issue of ownership of coupon interest as a question of law, rather than fact, and in failing to properly limit appellate review of the trial Court's determination on this issue.

3. The decision below determined a federal question in a way in conflict with applicable decisions of this Court.

This Court has held that the question of ownership of assets under the federal tax laws is a question of **fact. Helvering v. Clifford**, 309 U. S. 131 (1946). As such, the

trial Court's factual determination that petitioner owned the bonds, the coupons, and the tax-free income derived therefrom, may not be disturbed unless it was "clearly erroneous" under Fed. R. Civ. P. 52(a) (28 U. S. C.). **Commissioner v. Duberstein**, 363 U. S. 278 (1960). The rule "applies also to factual inferences from undisputed basic facts." *Id.*, 363 U. S. at page 291.

Contrary to the holdings of this Court, the court below held that the question of ownership was one of law, not fact, and refused to apply the clearly erroneous test:

> "Accordingly, we are not bound by the District Court's conclusion that the Bank should be treated as the owner of the bonds for federal income tax purposes." (Opinion below, p. A-4.)

In accordance with **Helvering v. Clifford**, *supra*, the trial Court's determination was a factual **finding**, and was not a legal conclusion as stated in the portion of the Opinion below just quoted. The trial court properly stated: "The Court finds that the Bank was the owner of the bonds and interest coupons . . ." (213a-214a). As previously noted, there is little doubt about this fact. Yet the court below called it a legal question and drew the opposite inference, in direct conflict with this Court's holdings in **Clifford** and **Duberstein**.

The court below sought to avoid **Duberstein**, by stating:

> "We are not here concerned with an area of the law where intent determines whether or not an increment of wealth is to be deemed income, as was the case in [**Duberstein**] . . . Here the question is not whether or not an increment of wealth is income (for it clearly is), but whether it is income from interest paid by a borrower, or tax-exempt interest from municipal bonds." (Opinion below, p. A-5.)

With due respect, the court below misread **Duberstein**. The statute there involved [26 U. S. C., § 102(a)] excludes from gross income property acquired by gift. (363 U. S. at 279-280.) The instant case involves a statute which excludes from gross income property acquired as interest on municipal bonds. In both cases, the basic factual question is whether the property which the government sought to include in gross income was in reality received by the taxpayer as a substitute for something else (personal services in **Duberstein**; loan interest, here). This court applied the clearly erroneous test to the trial court's findings, and stated:

> "It seems to us plain that as trier of the facts (the Tax Court) was warranted in concluding that despite the characterization of the transfer of the Cadillac by the parties and the absence of any obligation, even of a moral nature, to make it, it was at bottom recompense for Duberstein's past services, or an inducement to him to be of further service in the future." (363 U. S. at 291-292.)

The court below directly conflicted with this Court by dismissing the trial court's contrary finding, and basing its decision on its own opinion that the coupon interest received by petitioner was in reality recompense for a "loan". The unfettered appellate review indulged in by the court below is precisely what this court heretofore instructed the same court it must not do, in reversing the Sixth Circuit in **Duberstein**.

4. The decision below determines an important question of federal law which has not been, but should be, settled by this Court.

The basic issue here presented—whether or not the owner of "tax-exempt" bonds subject to a repurchase agreement, who possesses the right to receive coupon

interest, may exclude such interest from gross income—has been before the Courts of Appeals five times. This record reflects the fact that the transactions involved are numerous, of long standing, wide-spread, and crucial to the effective functioning of the municipal bond market. The statute involved was specifically enacted for the purpose of aiding in the flotation of local governmental bonds and securities. **American Viscose Corp. v. Commissioner**, 56 F. 2d 1033, 1034 (3d Cir. 1932).

The court below, and the Fifth Circuit in **Bank of Austin**, have created a significant exception to § 103(a) which (as this record establishes conclusively) will seriously erode the Congressional policy behind its enactment. **Bank of California** has stood for 35 years undisturbed by Congress. Nor has Congress evidenced any intent to treat differently those dealing in governmental bonds within the Fifth and Sixth Circuits, and those located elsewhere. This Court should pass on such a significant modification of long-standing federal policy. More important, a decision by this Court is necessary to again make uniform throughout the country the federal tax treatment of federally-chartered banks. This case alone directly involves approximately one million dollars. The indirect economic repercussions upon governmental units which issue bonds, upon dealers who make the market function, upon banks which assist dealers to perform that function, and upon those who ultimately invest in such bonds, are incalculable. Petitioner feels strongly that this issue is of such extreme importance as to justify full consideration by this Court.

CONCLUSION

For the foregoing reasons, petitioners pray that a writ of certiorari issue to review the judgment of the Sixth Circuit in this case.

Respectfully submitted

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